No. 82-1724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

—vs.—

ROBERT UPLINGER,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COMMITTEES ON SEX AND LAW, CIVIL RIGHTS, CRIMINAL LAW, AND CRIMINAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON BEHALF OF RESPONDENT UPLINGER

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MOTION OF THE COMMITTEES ON SEX AND LAW, CIVIL RIGHTS, CRIMINAL LAW AND CRIMINAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts of the Association of the Bar of the City of New York respectfully move for leave to file the attached brief as *amicus curiae*. The respondents, but not the petitioner, have consented to the filing of this brief.

The Association of the Bar of the City of New York (hereinafter "the Association"), chartered by the State of New York in 1871, is an organization of about 14,000 lawyers practicing or resident in the New York City metropolitan area. The Association has had a long-standing commitment to

criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. The Association conducts its work through committees. The committees with jurisdiction in respect of the subject matter of this appeal, the Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts (hereinafter "the Committees"), have joined together and been authorized by the Association to file this brief.

The Association, through its committees, has a deep interest in the decision of the New York Court of Appeals below, which is based on *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. denied*, 451 U.S. 987 (1981). The Association filed an *amicus* brief with the New York Court of Appeals in *Onofre*, urging the court to find the New York consensual sodomy statute, New York Penal Law § 130.38, unconstitutional.

The particular concern of the Committees, as demonstrated in the attached brief, is with the facial unconstitutionality of the challenged statute and the application of the constitutional right of privacy as developed by this Court. This appeal presents the question of the relationship between the state's police power and the constitutional rights of privacy and freedom of expression and association. Because the Association, through its committees, has long been concerned with these issues, it is in a unique position to speak out on their resolution in this case. The Committees believe that the constitutional issues are best addressed in the context of the arrest and conviction of Robert Uplinger, because the facts concerning the arrest and conviction of Susan Butler present additional complicated questions about prostitution and whether particular sexual acts performed in a parked car are taking place in public. Consequently, the Committees wish to address only the Uplinger prosecution, and limit their brief to that case.

Counsel for both Respondents gave their assent to the Committees' request for permission to file an *amicus* brief. Because the petitioner has refused to consent, the Committees respectfully move for leave to file the attached brief as *amicus curiae* with respect to the Uplinger case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE COMMITTEES ON SEX AND LAW, CIVIL RIGHTS, CRIMINAL LAW AND CRIMINAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON BEHALF OF RESPONDENT UPLINGER

The Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts of the Association of the Bar of the City of New York (hereinafter referred to respectively as "The Committees" and "The Association") hereby submit their brief *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court. The Committees' brief is in support of the position taken by the respondent Robert Uplinger. A motion requesting permission to file this brief is submitted simultaneously herewith, counsel for petitioner having denied consent to file. Consent was given by counsel for respondents Uplinger and Butler.

INTEREST OF AMICUS

The Association has had a long-standing commitment to criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. There are currently about 14,000 members of the Association and approximately seventy standing committees which conduct most of the Association's substantive work. Several standing committees of the Association have taken an active part in the drafting, editing or consideration of filing of this brief. The Executive Committee of the Association has authorized the filing of this brief by the Committees.

This brief is submitted because the Association, through the work of the Committees, recognizes that important issues of fundamental fairness and privacy affecting citizens of the State of New York as well as all citizens of the United States may be reached by this Court's consideration of this case. The federal constitutional right of privacy, as it relates to consensual, sexual activity among adults acting in private, is an issue implicated herein. Consequently, the Committees wish to present their views as *amicus curiae* in support of the decision reached below by the New York Court of Appeals.

PRELIMINARY STATEMENT

On August 7, 1981, Robert Uplinger was walking on a sidewalk near his home in Buffalo, New York, very late at night. He encountered Steven Nicosia and they engaged in friendly conversation, during which Uplinger introduced Nicosia to other men who were walking on the sidewalk. When some police officers ordered the men standing on the sidewalk to disperse, Uplinger invited Nicosia to return to Uplinger's home to engage in sexual activity. Nicosia, an undercover

police officer, arrested Uplinger for violating New York Penal Law § 240.35-3, which prohibits loitering or remaining in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Petitioner's Brief, at 4. In 1980, New York's Court of Appeals had found the New York law criminalizing "deviate sexual intercourse" to be unconstitutional in *People v. Onofre*, 51 N.Y.2d 476, and this Court had denied a petition for a writ of *certiorari* in May, 1981. 451 U.S. 987. Thus, the act which Uplinger suggested was lawful at the time of the conduct in this case.

Uplinger was convicted, and on appeal the County Court affirmed the conviction. Petitioner's Brief, at 6. New York's Court of Appeals granted leave to Uplinger to appeal, and his case was consolidated for argument with that of Susan Butler, an individual who had been tried under the same statute under different factual circumstances. Petitioner's Brief, at 4-6. Before the Court of Appeals, both Uplinger and Butler argued that Penal Law § 240.35-3 was unconstitutional. The Court of Appeals, in a short memorandum decision, held that the statute suffered from the same constitutional infirmities as the consensual sodomy statute which had previously been held unconstitutional in *Onofre*. *People v. Uplinger*, 58 N.Y.2d 937, 937-38 (1983). Consequently, the statute was held unconstitutional.

PERTINENT STATUTORY PROVISIONS

New York Penal Law, § 240.35 **Loitering**

A person is guilty of loitering when he:

. . .

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . .

New York Penal Law, § 240.00 **Offenses against public order; definitions of terms**

The following definitions are applicable to this article:

1. "Public place" means a place to which the public or a substantial group or persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

. . . .

New York Penal Law, § 130.00 **Sex offenses; definitions of terms**

The following definitions are applicable to this article:[1]

. . .

2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

SUMMARY OF ARGUMENT

New York Penal Law § 240.35-3 is facially unconstitutional. It is so sweeping that it penalizes the most discreet invitations, if made in a "public place," to engage privately in certain types of sexual conduct which the New York Court of Appeals had

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1 The term "deviate sexual intercourse" as used in § 240.35-3 is not defined anywhere in the New York Penal Law other than in § 130.00-2. Despite the implication in the introductory sentence of § 130.00 that the definitions contained therein only apply to the sex offense provisions in Article 130, § 130.00-2 provides the only statutory definitional source for a New York court called upon to construe § 240.35-3.

previously held were constitutionally protected. As construed by the New York Court of Appeals, the challenged statute lacks any requirements that the solicitation "be in any way offensive or annoying to others." 58 N.Y.2d at 938. The most intimate conversations are therefore within the reach of this statute. As such, the challenged statute impermissibly and overly broadly restricts individual rights and liberties protected by the First and Fourteenth Amendments of the United States Constitution, including the rights of free speech, privacy, association, due process and equal protection. The statute deserved the summary repudiation it received from New York State's highest court.

ARGUMENT

I. The Challenged Statute Is Facially Unconstitutional Because It Abridges Rights Protected by the First and Fourteenth Amendments of the United States Constitution.

Section 240.35-3 ("the statute") is facially unconstitutional. First, it penalizes free speech and association rights protected by the First Amendment in an overly broad manner not justified by any legitimate state interest. Second, the statute offends due process because it vests undue discretion in the police, prosecutors, judges and juries to define prohibited conduct according to their personal predilections. Additionally, by singling out particular groups for disparate treatment, without any rational basis for the distinction, the statute deprives unmarried or homosexual citizens of equal protection of the laws. In construing the statute, the New York Court of Appeals held that it was not susceptible to a narrowing interpretation which might save it from constitutional challenge.[2] Consequently, the statute as a whole is unconstitutional.

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2 The three-paragraph Court of Appeals decision refers to § 240.35-3 as a "companion statute" to § 130.38 (the consensual sodomy statute) and concludes that the loitering statute "suffers from the same deficiencies as did the consensual sodomy statute," 58 N.Y.2d at 937,

A. The Conduct At Issue Is Essentially Speech and Entitled To First Amendment Protection.

The statute sweeps too broadly. It penalizes speech as well as conduct, and is so sweeping that even a whispered invitation in a bar to a person of the same or opposite gender to engage in private oral sex would fall within its scope.

This Court has repeatedly held that a challenge to the facial unconstitutionality of a statute on First Amendment grounds may be withstood by the state only if the statute is *not* susceptible of application to protected speech. *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *Cohen v. California*, 403 U.S. 15, 18-22 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). While it is true that the statute purports to regulate the *conduct* of remaining in a public place with the intention of soliciting certain sexual conduct, that intention can only be expressed by

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which the Court of Appeals struck down in *Onofre*. In its brevity, the *Uplinger* decision suffers, however, from ambiguity and imprecision. It is unclear from the opinion whether the court's holding is based on privacy considerations; other First Amendment considerations, such as speech or associational rights; due process considerations; or whether the statute was viewed as so inextricably intertwined with the *Onofre* "companion statute" that it too must fall. It is even unclear whether the decision was based on the state or federal constitutions, or both. Indeed, this Court may conclude that the significant constitutional issues implicated in this case are "not presented with clarity, precision and certainty," *Rescue Army v. Municipal Court*, 331 U.S. 549, 576 (1947), so as to enable this Court properly to decide the case. *See Minnick v. California Department of Corrections*, 452 U.S. 105, 122-27 (1981); *Cowgill v. California*, 396 U.S. 371 (1970); *Michigan v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). The granting of a writ of certiorari in a case where the decision below is opaque as to the reasoning for its holding is a matter of particular concern to counsel, who are left to speculate as to the issues in the case which were of sufficient concern to cause this Court to grant the writ. The Association of the Bar, as representative of the interests of many New York lawyers, is concerned that the decision of important constitutional issues not be undertaken in a case where counsel's preparation may be of necessity inadequately informed as to the issues of concern to this Court.

speech. Thus, the statute as applied and on its face criminalizes speech. Indeed, Robert Uplinger was arrested for a statement that he made privately to an undercover police officer, while they were standing on a sidewalk late at night.

It has long been established that laws restricting the act of solicitation implicate First Amendment concerns. In *Thomas v. Collins*, 323 U.S. 516 (1945), this Court held that solicitation—in that case, speech encouraging individuals to join a labor union—was constitutionally protected speech, and that attempts to restrict such speech "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Id.*, at 530. *Accord*, *Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). *And see*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939). That the speech in this case has to do with private rather than political concerns does not take it outside the scope of First Amendment protection. *Connick v. Myers*, ____ U.S. ____, 103 S.Ct. 1684, 1690 (1983). In *Connick*, this Court stated:

> We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction.

Id., at 1690. Solicitation to engage in lawful sexual activities in private raises the same First Amendment concerns, as noted by the highest courts of California and Massachusetts in evaluating the constitutionality of criminal statutes dealing with homosexual solicitation. *Pryor v. Municipal Court of Los Angeles*, 158 Cal.Rptr. 330, 599 P.2d 636 (1979); *Commonwealth v. Sefranka*, 414 N.E.2d 602 (Mass.Sup.J.Ct. 1980). Under these standards, it is clear that Uplinger's speech, and similar discreet sexual solicitation, is constitutionally protected, and that the challenged statute's attempt to penalize it impermissibly abridges First Amendment rights. This Court

has identified only a few categories of speech which are not constitutionally protected: (1) speech which poses a clear and present danger of imminent violence or breach of the peace (*Terminiello v. Chicago*, 337 U.S. 1 (1948); *Feiner v. New York*, 340 U.S. 315 (1951)); (2) speech which is obscene or constitutes "fighting words," calculated to provoke an immediate violent response from the hearer (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)); and (3) speech which advocates criminal activity (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Uplinger's sexual solicitation of the undercover police officer fits in none of these unprotected categories.

Uplinger's remarks did not pose a clear and present danger of imminent violence or breach of the peace. They did not even involve ostentatious behavior. He had engaged the police officer in friendly conversation and the context gave him reason to believe that the officer would be receptive to a polite solicitation; indeed, the creation of such a belief is of the essence of undercover vice squad operations. *See, e.g., Pryor v. Municipal Court, supra*, 599 P.2d at 644 nn. 7, 8. However, the statute is broadly worded to criminalize *all* solicitations made in a public place, regardless of whether a clear and present danger of breach of peace exists. Indeed, although § 240.35-3 is contained in Article 240, titled "Offenses Against Public Order," the Practice Commentary printed in the official publication of the New York Penal Law, 39 McKinney's Consolidated Laws of New York Annotated (1980), states: "This type of conduct, clearly of a 'loitering' nature, has little or no tendency to create public disorder or alarm." *Id.*, at 316.[3] The Court of Appeals also construed the statute as omitting any requirement that the proscribed conduct "be in any way offensive or annoying to others" and, therefore, "the challenged statute cannot be categorized as a harassment statute." 58 N.Y.2d at 938.

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3 The author of the commentary is identified as former Counsel to the Commission on Revision of the Penal Law and Criminal Code of New York. *Id.*, at iii.

Neither did Uplinger's remarks constitute "fighting words" or obscenity. The "fighting words" doctrine applies to "situations in which personally abusive epithets are used in a face-to-face confrontation," Comment, "Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine," 41 Ohio St. L.J. 553, 572 (1980), and in which the words themselves "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Lewis v. New Orleans*, *supra*, at 133, but not, as here, to discreet invitations where the object is sexual intimacy. However, the statute irrationally criminalizes even the most subtle, innocuous and discreet sexual invitation. *See*, *Pryor*, *supra*, 599 P.2d at 644 n.7. It is in the nature of a sexual solicitation to be discreet and and friendly, because the intention and hope of the solicitor is obviously to secure a favorable reponse. Furthermore, prosecutions based on citizen complaints or disruptions of public order are rare, with arrests normally based on the testimony of police "decoy" solicitees. Note, "There May Be Harm In Asking: Homosexual Solicitations and the Fighting Words Doctrine," 30 Case West. Res. L.Rev. 461, 486 (1980). Indeed, cases concerning the enforceability of solicitation laws against homosexuals invariably involve solicitations of plain-clothes police investigators rather than complaining citizens. Consequently, the likelihood that the typical sexual solicitation would provoke a violent response is so remote that it would be difficult to justify a sweeping prohibition of otherwise protected speech merely to avoid such an unlikely response.

Neither could a discreet homosexual solicitation be considered "obscene." Uplinger's statement was an invitation to an apparently willing listener to engage in lawful activities in private. While Uplinger's language might be characterized as "explicit" or "crude," it had a communicative purpose. Furthermore, with respect to facial constitutionality, the statute does not require that the words in which the solicitation is made be themselves obscene; it penalizes a solicitation made in language so circumspect that only a listener attuned to hear the invitation buried in circumlocution would even know a solicita-

tion was taking place. Under § 240.35-3, a polite and friendly invitation to "come home with me and have some fun" would be unlawful if the intention of the solicitor included the possibility of sexual activities described in the statute.

Finally, Uplinger's speech, which conveyed an invitation to engage in sexual activity in his home, did not advocate criminal activity. At the pertinent time, the activity solicited was lawful in New York. *People v. Onofre, supra.*

B. The State Has Not Demonstrated A Compelling Interest In Regulating The Speech At Issue.

Because Uplinger's speech was entitled to First Amendment protection, a statute which would punish such speech without a compelling justification is facially unconstitutional. The broad sweep of the statute is also pertinent to the First Amendment inquiry, because, having concluded that the speech is constitutionally protected, only a statute narrowly drafted to meet a compelling state interest may withstand the required strict scrutiny. However, the challenged statute is neither narrowly drafted to meet a compelling state interest nor drafted with such specificity that inadvertant chilling of protected activity is avoided.[4]

The interest articulated by the prosecutor with respect to this statute is "the suppression of public nuisance." *People v. Uplinger, supra*, 58 N.Y.2d at 940 (dissent), quoting Model Penal Code, § 251.3, Comment, at 476. However, the majority of the New York Court of Appeals expressly held that "the challenged statute cannot be categorized as a harassment statute." 58 N.Y.2d at 938. Thus, the statute goes far beyond suppressing a "public nuisance." There are other New York

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4 If this Court concludes, as it did in *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), that some of the statute's hypothetical applications are not facially invalid, then the case should be remanded to the Court of Appeals for specific consideration of a construction of the statute which would adequately protect the First Amendment, due process and equal protection rights of citizens.

Penal Law provisions not challenged here which deal with offensive behavior, disorderly conduct, or harassment (N.Y. Penal Law §§ 240.20, 240.25), and which adequately serve to protect the state's interest in those cases where the solicitor's behavior might create a genuine public nuisance or immediate threat to good order. With those other provisions on the books, however, all that is *added* by the challenged statute is the prohibition of those solicitations which do not create a public nuisance. The prevention of such solicitation, consequently, is not required to satisfy the interests articulated by the state. As the Court of Appeals correctly observed, "the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others." 58 N.Y.2d at 938.

The statute is also impermissibly broad in its wide-ranging prohibition of all such solicitation in a "public place," where that term is broadly defined. *See* New York Penal Law § 240.00-1. As noted by the California Supreme Court in *Pryor, supra*, the mere fact that such a solicitation takes place in public does not automatically establish the state's right to punish it, because in the "context" it may be inoffensive. 599 P.2d at 644. Thus, in such "public places" as "singles bars" or "gay bars," such speech may be expected and welcome by those in attendance, and the public order concerns articulated by the state would appear irrelevant in those settings, even though they are undoubtedly "public places." However, the statute as it now reads would penalize such speech regardless of its appropriateness to the "context." The statute has not been construed by the New York courts in a way which would preserve the constitutional rights of citizens consistent with legitimate state interests.

C. The Statute Also Violates Due Process Protections.

The statute is also defective on due process grounds due to its vagueness. "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness]

doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1973). However, the challenged statute not only prohibits engaging in or soliciting "deviate sexual intercourse," a term which is carefully defined by the legislature (N.Y. Penal Law § 130.00-2), but extends such prohibition to "other sexual behavior of a deviate nature," a phrase which is not statutorily defined either in whole or as to its constituent parts. As a matter of statutory construction, the latter phrase must refer to unspecified conduct not included within the definition of "deviate sexual intercourse," but the individual is left to speculate as to what conduct is meant to be included. As such, the statute does not give fair notice to the individual of what speech or conduct is forbidden, and gives undue discretion to police officers, judges and juries to impose their personal views of what is appropriate sexual conduct upon defendants, rather than providing an objectively determined standard as required by law. *Kolender v. Lawson*, 103 S.Ct. 1855, 1858-61 (1983); *Smith v. Goguen*, *supra*, at 572-73; *Pryor, supra*, 599 P.2d at 644, 647; *Commonwealth v. Sefranka*, *supra*, at 604.

Even the question whether particular behavior is considered "sexual" may well depend upon the experiences and social conditioning of the individual. But the characterization of particular behavior as "deviate" is particularly problematic; sex research has placed into serious question the appropriateness of labeling even those activities defined in Penal Law § 130.00-2 as "deviate." *See, e.g.*, A.C. Kinsey, W.B. Pomeroy, & C.E. Martin, *Sexual Behavior in the Human Male* (1948); A.C. Kinsey, W.B. Pomeroy, C.E. Martin & P.H. Gebhard, *Sexual Behavior in the Human Female* (1953); P. Blumstein & P. Schwartz, *American Couples* (1983). Blumstein and Schwartz, in their study of American couples, found that only about ten percent of the heterosexual (both married and unmarried) couples in their study sample of several thousand had never engaged in sex of a type described in Penal Law § 130.00-2, and that sexual satisfaction as a binding force in keeping couples together correlated highly with the practice of

oral sex as part of a relationship. Blumstein & Schwartz, *supra*, at 231-37. Clearly, characterization of any particular consensual sexual activity as being "deviate" impermissibly depends on the "personal predilections" of individuals in the law enforcement and criminal justice systems. *Kolender*, *supra*, at 1858-59. Thus, by extending the statutory prohibition beyond the precisely defined phrase "deviate sexual intercourse" to conduct which is described by language which is unduly vague because "there is no commonly accepted understanding of the quoted terms," *Sefranka*, *supra*, at 604, the state impairs the ability of individuals to conform their conduct to the law. The 90% of heterosexual couples found by Blumstein & Schwartz to have engaged in such acts would be surprised to learn that their behavior is considered to be the deviation from the norm.

Aside from the vagueness of the statute, there is a further due process problem with its application to the particular case of Robert Uplinger. The activity which formed the basis of his conviction occurred two years after the well-publicized New York Court of Appeals decision in *Onofre* striking down the consensual sodomy statute. Thus, Uplinger could reasonably have expected that his discreet invitation to another adult to engage in protected activity in his home was not conduct which could conceivably be criminal, particularly since, as the Court of Appeals held, the statute did not require that the prohibited conduct "be in any way offensive or annoying to others." 58 N.Y.2d at 938. While this statutory interpretation followed Uplinger's action, no reasonable interpretation of the conversation at issue between Uplinger and the police officer could lead to the conclusion that it was harassing. Thus, Uplinger's conviction must be set aside on the ground that the prior *Onofre* decision gave him a fair expectation that the conduct prosecuted here was entirely protected.

D. The Statute Also Violates Equal Protection Rights.

The challenged statute also violates the constitutional requirement of equal protection of the laws contained in the Fourteenth Amendment, because it allows married individuals

to engage in public solicitation of each other to engage in the conduct defined as "deviate sexual intercourse," regardless of the existence of the same factors with respect to them as the state relies upon in justifying the application of the statute to unmarried individuals. If the purpose of the statute is to prevent a public nuisance in the form of harassment or public disorder, there is no rational basis for drawing such a distinction. A husband might solicit his wife to return home to engage in "deviate sexual intercourse" in a manner which harasses his wife or is calculated to provoke onlookers into a violent reaction, and the interest, if any, of the state would be just as strong in preventing such an occurrence in public as it might be with respect to unmarried couples. *Cf.*, *Onofre*, *supra*, 51 N.Y.2d at 491-92.

Indeed, the statute as phrased lends itself to discriminatory enforcement not only against unmarried heterosexual couples, but especially against homosexuals. In restricting the permissible scope of a similar California statute, the California Supreme Court noted that such laws lend themselves to invidious discriminatory enforcement against homosexuals. *Pryor*, *supra*, at 644 n.8. A statute which is primarily used to harass and chill the speech, associational and privacy rights of a "discrete and insular minority," *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), is constitutionally suspect in the absence of a compelling state interest. Homosexuals bear all of the characteristics of such a minority. E. Chaitin and V.R. Lefcourt, "Is Gay Suspect?", 8 Lincoln L.Rev. 24 (1973); M.C. Dunlap, "The Constitutional Rights of Sexual Minorities: The Crisis of Male/Female Dichotomy," 30 Hastings L.J. 1131, 1145-47 (1979); D.A.J. Richards, "Sexual Autonomy and the Right to Privacy," 30 Hastings L.J. 957, 987 n.130 (1979). Consequently, the statute violates the rights of both homosexuals and unmarried heterosexuals without any rational basis or state interest to justify the differential treatment.

II. The Freedom From Unwarranted Governmental Intrusion Concerning Fundamental Issues of Privacy Requires Affirmation of the Court of Appeals' Decision.

This appeal represents a collateral attack on the Court of Appeals' decision in *Onofre*, the underpinning of the opinion below. Recognizing this, petitioner in his application for *certiorari* invited this Court to overrule *Onofre*, which held that New York's consensual sodomy statute violated the right of privacy as well as of equal protection. This Court should decline the invitation. *Onofre* and the decision below both represent sound applications of the right of privacy now recognized under the constitution. While the right of privacy is not absolute, the right to be free from unwarranted intrusion into one's privacy is the very essence of a free society. The concept of individual freedom must include an individual's right to develop his or her own lifestyle as he or she sees fit. Nothing is more fundamental to the concept of privacy than personal sexual conduct, which is what the invalidated New York statutes tried to regulate.

In *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis, dissenting, articulated a constitutional underpinning for a right of privacy in a passage which has been frequently invoked by this Court:

> Also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.
>
> • • •
>
> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the gov-

> ernment, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.

This Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1969), recognized the right of privacy as an independent constitutional right. In *Griswold*, the Court, basing its decision upon a "zone of privacy" relationship, struck down a statute which forbade the use of contraceptives by a married couple. The right to privacy was extended to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which this Court concluded that if the distribution of contraceptive devices to persons who were married could not be prohibited, then equal protection must be accorded to unmarried persons:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marriage couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamenally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453; *see also Stanley v. Georgia*, 394 U.S. 557 (1969). In *Roe v. Wade*, 410 U.S. 113, 153 (1973), the Court held that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In *Bigelow v. Virginia*, 421 U.S. 809, 813 (1975), the Court struck down a statute prohibiting advertising to "encourage or prompt the procuring of an abortion." In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court struck down a state ban relating to the advertisement of contracep-

tives, concluding that the state may not "suppress the dissemination of concededly truthful information about protected activity." These cases recognize that the right of access to a protected activity "is essential to the exercise of a constitutionally protected right of decision." *Carey, supra*, at 688.

The New York Court of Appeals concluded in *Onofre* that the state had no interest in regulating private consensual sexual behavior between adults and, in particular, "deviate sexual behavior" between homosexuals or unmarried heterosexuals. The Court of Appeals stated:

> There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. . . . The people have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the state.

51 N.Y.2d at 489-90. New York Penal Law § 240.35-3, because it punishes an individual who engages a willing participant in quiet conversation, offending no other person, at the conclusion of which an invitation is extended to engage in protected conduct, is unconstitutionally violative of the individual's rights of privacy, and the decision of New York's Court of Appeals striking down the statute should therefore be upheld.

The Court of Appeals' decision in *Uplinger*, relying on its decision in *Onofre* for the principle that "the State may not constitutionally prohibit sexual behavior conducted in private between consenting adults," 58 N.Y.2d at 938, concluded that "(t)he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy." *Id.* Unless and until this Court prescribes the outer limits of the constitutional rights implicated in these cases, the highest courts of the states

must be free to interpret those rights consistent with this Court's prior decisions which, in this instance, indicate a clear trend of decision developing toward the protection of the activities with which the New York Court of Appeals was concerned in this case.

This Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976)(constitutional challenge in declaratory judgment action to Virginia consensual sodomy law dismissed), did not preclude the New York Court of Appeals from recognizing the right of privacy in this context. As a federal district court recently observed, "six Justices in *Carey* [*v. Population Services*, 431 U.S. 678 (1977)] agreed that the summary affirmance in *Commonwealth's Attorney* did not definitively answer the difficult question of whether the right of privacy extends to private sexual conduct between consenting adults." *Baker v. Wade*, 553 F.Supp. 1121, 1138 (N.D.Tex. 1982); *accord*, *Onofre*, *supra*, 51 N.Y.2d at 493-94. Furthermore, equal protection arguments pertinent in *Onofre* and *Uplinger* were apparently not raised as a separate ground of constitutional challenge in the Virginia case, where the challenged sodomy law did not distinguish between married and unmarried heterosexuals in forbidding certain sexual conduct. *Baker v. Wade*, *supra*, 553 F.Supp. at 1138 n.44. Thus, the New York Court of Appeals could view its decision in *Uplinger* (flowing from its decision in *Onofre*) as within the developing concept of privacy the outer boundary of which has not yet been marked by this Court.

New York Penal Law § 240.35-3 is no less intrusive than the provisions declared unconstitutional in *Onofre*. It not only punishes an individual who engages a willing participant in a quiet conversation, offending no other person; it also invites inquiry into what type of sex a person has in mind when he stands on a street corner, in a bar, or some other "public place." In sum, it is more than irony that this case will be argued in 1984—it is a reminder, heeded by New York State's highest court, that privacy is the cornerstone of a free society. Both *Onofre* and the decision below are sound.

CONCLUSION

For the reasons stated above, the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association urge this Court to affirm the decision of the New York Court of Appeals that Penal Law § 240.35-3 is unconstitutional.

Respectfully submitted,

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